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SEC

SERVICE DATE - OCTOBER 13, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41685

CF INDUSTRIES, INC.,

v.

KOCH PIPELINE COMPANY, L.P.

Decided: October 7, 1998

On March 27, 1996, CF Industries (CF) filed a complaint against Koch Pipeline Company, L.P. (Koch) seeking an order under 49 U.S.C. 15503(a): (1) directing Koch to roll back rate increases on pipeline transportation of anhydrous ammonia on the ground that the rate increases are unreasonable under 49 U.S.C. 15501(a) and discriminatory under 49 U.S.C. 15505; (2) requiring Koch to desist from unfair or destructive competitive practices that assertedly advantage its affiliate, Koch Nitrogen Company; (3) awarding appropriate damages under 49 U.S.C. 15904(b)(2); and (4) granting such other relief as the Board deems just and proper.

On May 2, 1996, Farmland Industries, Inc. (Farmland) petitioned for leave to intervene as a complainant. Farmland's intervention was granted by order served July 25, 1996. In a decision served May 14, 1997, the Board initiated an investigation to determine whether Koch's pipeline rates are unreasonably high and whether the rates unreasonably discriminate against complainants. Therein, the Board also set forth a procedural schedule allowing for the filing of simultaneous opening, reply and rebuttal statements by all parties. Administrative Law Judge (ALJ) Jacob Leventhal was assigned to the proceeding to facilitate the discovery process. By decision served June 23, 1997, the ALJ adopted a stipulated protective order jointly filed by the parties.

We have reviewed the pleadings filed with the Board and find that most of the pleadings filed by the parties fail to comply with the protective order regarding the designation and filing of "Confidential Information" and "Highly Confidential Information." The protective order stated that a party could designate any document or discovery response or portion thereof, as "Confidential Information" if it contains confidential or proprietary information or information not made generally available to the public and as "Highly Confidential Information" if it contains or incorporates: (a) information that the party or person has a good faith belief may cause commercial or competitive injury if disclosed to another party or person; or (b) information that a party or person is prohibited from disclosing by statute, regulation or contractual agreement. The protective order indicates that it is intended to prevent disclosure of commercially sensitive information such as prices, terms of individual contracts or related agreements, commercially sensitive plans or strategies, and any other commercially sensitive facts or data contained in "Confidential Information" or "Highly Confidential Information," which shall include but shall not be limited to the identity of buyers, sellers, commercially sensitive specific price mechanisms, production plans or information, distribution plans or information, or prices of identifiable contracts.

The protective order provides that any pleading, motion or other paper filed with the Board which contains “Highly Confidential Information,” shall enclose the “Highly Confidential Information” in double brackets (“[[ ]]”) and stamp or print “Highly Confidential Information” on each page of such pleadings that contains “Highly Confidential Information.” The first page of such pleading shall clearly indicate that the pleading contains “Highly Confidential Information.” “Highly Confidential Information” may also be attached to the pleading in separate attachments that are clearly designated as containing “Highly Confidential Information.” A similar provision applies to “Confidential Information.”

Many of the documents filed by the parties fail to designate exactly what information is “Confidential Information” and “Highly Confidential Information.” Rather, they indicate that the entire pleading is confidential or highly confidential, when in fact it clearly is not. In order for the Board to prepare a decision in this proceeding based on the facts presented, the Board must be able to present and discuss facts and argument, and not be inhibited by a overly protective designation of evidence and argument as confidential or highly confidential.

The parties are directed to review their filings (including all maps and charts) and to determine and designate what particular information, if any, is “Confidential Information” or “Highly Confidential Information”, and to notify the Board where the “Confidential Information” or “Highly Confidential Information” designation can be removed.<sup>1</sup>

It is ordered:

1. The parties are directed to respond within 20 days from the date of service of this decision to the extent that their pleadings contain “Confidential Information” or “Highly Confidential Information.”
2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

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<sup>1</sup> We note that, under paragraph 15 of the protective order, a party at any time can request that a producing party cancel the “Confidential Information” or “Highly Confidential Information” designation of any document or discovery response or portion thereof. We encourage the parties to fully cooperate for purposes of removing the “Confidential Information” and “Highly Confidential Information” designations where those designations are not appropriate.